Supreme Court, U.S.
FILED

No. 99-46

IN THE

Supreme Court of the United States

JOANNE STONE-FINCH, JOVITA FINE
and JOSEPH WENZEL,

Petitioners,

v.

CITY OF PRESCOTT, a municipal entity, and,
HASSA YAMPA LAKE HOLDINGS, L.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF PRESCOTT

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Petitioners claim that the City of Prescott ("City"), through its elected City Council, violated their civil rights by depriving them of the opportunity to petition for a city referendum challenging the transfer of certain City-owned real property. The statutes and Constitution of the State of Arizona except legislation, including municipal actions, that becomes effective immediately upon passage by the inclusion of the express declaration of the existence of an emergency from the citizens' reserved state right of referendum. The challenged municipal action transferring the City-owned real property included such emergency language thereby excepting the action from referendum. The United States District Court for the District of Arizona granted summary judgment in favor of the City of Prescott, and the Ninth Circuit Court of Appeals affirmed the district court judgment.

STATEMENT OF JURISDICTION

Petitioners' Petition for Writ of Certiorari does not present any compelling reason for this Court to exercise its discretion for review of the opinion of the United States Court of Appeals, Ninth Circuit. Petitioners merely assert that the Ninth Circuit Court misapplied properly stated law. They are wrong. Moreover, none of the considerations set forth in Rule 10, Rules of the Supreme Court of the United States even remotely apply to this case.

STATEMENT OF THE CASE

Prescott's Mayor and City Council passed Ordinance No. 3423 providing for the sale of City-owned Hassayampa Lake property to Hassayampa Lake Holdings, L.L.C. and Ordinance No. 3460 accepting a grant of real mining rights

to quiet its title to the property. Each of the ordinances included a declaration of emergency stating,

> . . . THAT the immediate operation of the provisions of this ordinance is necessary for the immediate preservation of the public peace, health or safety, and that an EMERGENCY is hereby declared to exist; and THIS ORDINANCE SHALL BE IN FULL FORCE AND EFFECT FROM AND AFTER ITS PASSAGE, ADOPTION AND APPROVAL BY MAYOR AND COUNCIL OF THE CITY OF PRESCOTT,

thereby rendering them effective immediately and excepting them from referendum.

The people of the State of Arizona reserved the referendum power subject to an exception for "laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the State Government and State institutions. Constitution of the State of Arizona, Art. IV, Part 1, § 1(3) The Arizona Constitution further provides that, "no such emergency measure shall be considered passed by the Legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative. . . ." *Id.*

The Arizona Constitution also reserves the power of the referendum "to the qualified electors of every incorporated city, town, and county as to all . . . matters on which . . . [they] . . . shall be empowered by general laws to legislate." *Id.* § 1(8).

The exception of emergency legislation from referendum is extended to municipal measures by Arizona Revised Statutes § 19-142.B. that provides, in part,

> B. A city or town ordinance, resolution or franchise shall not become operative until thirty days after its passage by the council and approval by the mayor, . . . , except emergency measures necessary for the immediate preservation of the peace, health or safety of the city or town. An emergency measure shall not become immediately operative unless it states in a separate section the reason why it is necessary that it should become immediately operative, and unless it is approved by the affirmative vote of three-fourths of all the members elected to the city or town council, taken by ayes and noes, and also approved by the mayor.

Petitioner citizens and registered voters of Prescott, except Joseph Wenzel, opposed the sale of Hassayampa Lake and sought to overturn the municipal action of the Prescott City Council by filing a lawsuit in state court seeking to enjoin the sale, *Glustrom v. City of Prescott, Yavapai County Superior Court Cause No. CV 95-0752*. Subsequently, Prescott resident and registered voter Robert Hay's request that the Prescott City Clerk issue a referendum petition to refer Ordinance No. 3640 to city voters was rejected by the City Clerk because the ordinance was passed with an emergency declaration and therefore not subject to referendum under the Arizona Constitution. Mr. Hay responded by filing suit in state court contending that the City had violated Prescott citizens' rights to a referendum under the Arizona Constitution, *Hay v. City of Prescott*,

Yavapai County Superior Court Cause No. CV 96-0015. Those state court proceedings were summarily dismissed based upon rulings that passage of the ordinances with the emergency clause was an exercise of legislative discretion that is not subject to judicial review even if there was no actual emergency. The Arizona Court of Appeals and the Arizona Supreme Court declined further review.

Petitioners then filed this federal civil rights action alleging that the City, its officials, and the developer who purchased Hassayampa Lake had violated and conspired to violate their constitutional referendum right. This federal suit seeks the same end as their unsuccessful state court actions and challenges the City's use of the emergency clause generally.

ARGUMENT FOR DENYING THE WRIT

I.

PETITIONERS FAIL TO STATE A CLAIM UNDER 42 U.S.C. § 1983.

There is no federal right to referendum nor is there any federal constitutional interest for the Court to protect or review. Legislative emergency measures, including municipal emergency measures, are constitutionally excluded from the reserved right to referendum in Arizona. An ordinance that includes the declaration of an emergency renders it effective immediately upon passage, and it is not subject to referendum. Article IV, Part 1, §§ 1(3) and 1(8) of the Constitution of the State of Arizona and Arizona Revised Statutes § 19-142.B. The Arizona Supreme Court has specifically addressed the use of the emergency clause

declaration as part of a municipal ordinance and held that the "determination by the legislature that an emergency exists is an exercise of legislative discretion not reviewable by the judiciary". *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 387, 227 P.2d 1011, 1013 (1951)

Arizona has not created a referendum right to challenge an ordinance passed with an emergency declaration. The City of Prescott ordinances that are the subject of this lawsuit are emergency measures for which no referendum right applies. Petitioners seek to expand their rights beyond those bestowed by the Constitution of the United States or reserved by the Constitution of the State of Arizona; the appropriate venue for petitioners is the Arizona State Legislature, not the state and federal courts.

Petitioners' argument that their state right to a referendum is established by the Tenth Amendment was found to lack merit by the Ninth Circuit Court of Appeals because the Tenth Amendment limits federal power, not power of states or municipalities.

II.

PETITIONERS' CLAIMS ARE BARRED BY *RES JUDICATA* AND COLLATERAL ESTOPPEL.

The district court ruled that the doctrine of *res judicata* does not bar this action nor divest it of subject matter jurisdiction. The City respectfully disagrees and submits that the doctrines of *res judicata* and collateral estoppel provide additional bases to deny the Petition for Writ of Certiorari.

A. Identical issues were presented in the state court.

The claims presented by petitioners have been litigated and dismissed in the two state court actions cited above; one of which was litigated by the petitioners of this matter, except for Joseph Wenzel. All of the petitioners, including Mr. Wenzel, and all Prescott voters were virtually represented in both of the prior state actions, therefore, this suit, an attempt to relitigate the prior state actions in the form of a 42 U.S.C. § 1983 federal action, is barred by collateral estoppel and *res judicata*. The claims presented by petitioners to the district court are identical to the claims presented and dismissed in the foregoing state court proceedings.

B. Petitioners are parties subject to the collateral bar doctrine.

The petitioners in the state court proceedings identified above sued the City of Prescott in their capacity as residents of the City of Prescott; the state court lawsuits were representative suits — the petitioners had no personal right independent of their representative role as residents of the City of Prescott. The petitioners of this lawsuit, asserting standing as registered voters and residents of Prescott, were parties to the state court lawsuits personally or under the doctrine of virtual representation and are bound by those state court decisions by the doctrines of *res judicata* and collateral estoppel.

The virtual representation principle has been applied in taxpayer initiated litigation in order to render judgments in cases seeking to determine a public right or a matter of public interest that are binding upon all other taxpayers. *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (1990).

The doctrine of virtual representation precludes petitioners, including Mr. Wenzel (or any other Prescott citizen) from relitigating an issue of public interest that a similarly situated citizen has previously litigated to a determination on the merits in another suit against the same governmental entity. *Floyd v. Smith*, 820 F. Supp. 350 (E.D. Tenn. 1993); *El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 599 P.2d 175 (1979), *cert. denied*, 445 U.S. 938, 100 S. Ct. 1331, 63 L. Ed. 2d 772 (1980); *Salt River Project Agr. Imp. and Power Dist. v. Apache County*, 171 Ariz. 476, 831 P.2d 852 (App. Div. 1 1992).

C. Federal Courts give full faith and credit to state court judgments.

Petitioners do not assert any federal constitutional claim; they merely reassert the claims that were previously litigated in the state court and add allegations that the previously litigated claims constitute civil rights violations under 42 U.S.C. §§ 1983, *et seq*. Repackaging these claims in the context of a civil rights claim does not circumvent the collateral bar doctrine.

Res judicata is a judicial doctrine grounded in public policy considerations to insure that at some point there will be an end to litigation. *Lee v. Johnson*, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1950). The doctrine is applied by federal district courts to give full faith and credit to judgments rendered by state courts to preclude civil rights suits founded upon claims previously decided in state court litigation. The orders issued by the Yavapai County Superior Court in the state actions prevent petitioners from reasserting the same claims in the Federal District Court — even in the added context of a civil rights violation claim. *Homola v. McNamara*, 59 F.3d 647 (7th Cir. 1995); *Bolling v. City & County of Denver, Colorado*, 790 F.2d 67 (10th Cir. 1986).

CONCLUSION

The City's use of a state constitutionally delegated power to pass an ordinance excepted from the state-created right of referendum does not infringe upon any federal constitutional right. Arizona law specifically provides for municipal ordinances passed with an emergency declaration to be given immediate effect. Constitution of the State of Arizona, Art. IV, Part 1, § 1(3), Arizona Revised Statutes § 19-142 (1991). The Arizona courts have ruled that "the determination by the legislature that an emergency exists is an exercise of legislative discretion not reviewable by the judiciary." *City of Phoenix v. Landrum & Mills Realty Co.*, 227 P.2d 1011, 1013 (Ariz. 1951). Under all applicable constitutional, statutory and case law, Arizona has not created a referendum right to challenge an ordinance passed with the emergency declaration that was included in the municipal actions that are the subject of this action. Petitioners have not identified any federal or state right that the City violated in passing ordinances with an emergency declaration, therefore, they are unable to state a claim under 42 U.S.C. § 1983. *Duffy v. Riveland*, 98 F.3d 447, 456 (9th Cir. 1996).

In addition, petitioners' claims are barred by the application of the doctrines of *res judicata* and collateral estoppel to the state court rulings on the issues presented in this federal suit.

Petitioners do not present any compelling reason for this Court to grant their petition for writ of certiorari. None of the considerations expressed in Rule 10, Rules of the Supreme Court of the United States apply to this case. Petitioners merely present their dissatisfaction with the factual findings and application of properly stated rules of

law by the courts below: United States Court of Appeals, Ninth Circuit; United States District Court, District of Arizona; Supreme Court of Arizona, Arizona Court of Appeals and Yavapai County Superior Court. The public policy considerations of insuring that at some point there will be an end to litigation has never been more applicable. The point for this litigation to come to an end is long overdue; the petition for writ of certiorari must be denied.

Respectfully submitted,

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